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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

RICHARD DENIER, Plaintiff and Appellant, v. SOTHEBY'S INTERNATIONAL REALTY, INC., et al., Defendants and Respondents.	H045067 (Monterey County Super. Ct. No. 17CV001355)

Appellant Richard Denier owns real property in Carmel, California. Respondent Sotheby's International Realty, Inc. (Sotheby's International) leased the property from 1995 through July 2017. Denier sued Sotheby's International, along with its parent company Realogy Holdings Corporation (Realogy), for breach of contract and fraud in connection with the parties' negotiations for a new lease.[1] Denier alleged that Sotheby's International breached a letter of intent because it failed to negotiate the terms of a new lease in good faith.

The trial court sustained Sotheby's International's demurrer to Denier's complaint without leave to amend, finding that the letter of intent was not binding because it could be terminated at any time by either party for any reason. Denier appeals the judgment entered following Sotheby's International's successful demurrer. We affirm the judgment.

[1] Other than to identify Realogy as the parent company of Sotheby's International, Denier's complaint contains no allegations regarding Realogy.

I. STATEMENT OF THE FACTS AND CASE[2]

Denier filed a complaint against Sotheby's International and Realogy alleging the following: Denier's property is located at 200 Clock Tower Place in Carmel. Sotheby's International entered into a 22-year lease commencing on June 8, 1995, and ending on July 31, 2017. On December 9, 2016, Sotheby's International provided a letter of intent to Denier that stated the parameters by which Sotheby's International would negotiate the terms of a new seven-year lease of Denier's property. Specifically, the letter of intent provided: "This letter is not intended, nor shall it be deemed or interpreted to be a lease agreement between Landlord and Tenant. Rather, this letter constitutes the agreement of Landlord and Tenant to conduct further negotiations concerning a written lease agreement between Landlord and Tenant. This letter and the terms contained herein are subject to approval by Sotheby's International Realty. [¶] Landlord and Tenant agree to negotiate in good faith. Either Landlord and [*sic*] Tenant may, for any reason and without cause, terminate negotiations and this Letter of Intent at any time."

The letter of intent also contained proposed terms of a new lease agreement, which included the base rent, the right to expand, tenant improvements, and the right to sublease. Further, the letter included a disclaimer section that stated: "This proposal is an outline of the major lease provisions only and is neither a binding legal agreement nor should it be construed as a legal proposal to lease. Neither Landlord nor Tenant shall have any obligations resulting from the proposal made hereby nor shall any obligation or liability be incurred by either party until and unless Landlord approves Tenant's accountant prepared financial statements and a Lease is mutually executed by Tenant and Landlord and delivered to Tenant."

On December 9, 2016, Denier accepted the offer as stated in the letter of intent and returned it to Sotheby's International, which acknowledged receipt of the acceptance on December 12, 2016. Sotheby's International informed Denier that it was waiting to

[2] Because this is an appeal of a judgment entered following a demurrer, the facts are derived from the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

see if " 'other offers come back before we make our decision how to proceed.' " Ultimately Sotheby's International did not enter into a new lease agreement with Denier.

The complaint alleges two causes of action in connection with Sotheby's International's failure to negotiate a new lease. The first cause of action is for breach of contract, and alleges: "Sotheby's [International] breached the agreement and the covenant of good faith and fair dealing, implied in all agreements, by refusing to negotiate and enter into a lease on the terms Sotheby's [International] proposed and Denier accepted."

The second cause of action is for fraud, and alleges: "Sotheby's [International] had no intention to move forward and negotiate in good faith after [Denier] accepted all of the proposed terms to lease the Premises. [¶] . . . Sotheby's [International] had no intention of moving forward to lease the Premises, but rather used [Denier's] acceptance of Sotheby's [International's] proposal as leverage with an alternative premises."

Sotheby's International demurred to the complaint asserting that it failed to allege facts sufficient to state a cause of action (Code Civ. Proc., § 430.10, subd. (e).) The trial court sustained the demurrer without leave to amend, finding that because the terms of the letter of intent allowed either party to terminate the agreement at any time and for any reason, there was no binding contract. A judgment in favor of Sotheby's International was entered and Denier filed a timely notice of appeal.

II. DISCUSSION

A. Standard of Review

The standard of review for an appeal from a judgment after the trial court sustains a demurrer without leave to amend is well established. " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to

constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank, supra,* 39 Cal.3d at p. 318.)

B. Breach of Contract

Denier asserts that the letter of intent he entered into with Sotheby's International was an enforceable agreement to negotiate a lease extension in good faith. Sotheby's International argues that the letter of intent on its terms was neither binding nor enforceable. The issue then is how to construe the letter of intent under the law.

The principles governing the interpretation of contracts are set forth in the Civil Code, and require us to carefully examine the language of the letter of intent. "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.)[3] "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practical, each clause helping to interpret the other." (§ 1641.) "The words of a written instrument are generally to be understood in their ordinary and popular sense. [Citation.] The objective intent as evidenced by the words of the instrument, not the parties' subjective intent, governs our interpretation. [Citation.] '[T]he outward manifestation or expression of assent is controlling [citation], and . . . what the language of an [instrument] means is "a matter of interpretation for the courts and not controlled in any sense by what either of the parties intended or thought its meaning to be . . . ." [Citation.]' [Citation.]" (*Beck v. American Health Group International, Inc.* (1989) 211 Cal.App.3d 1555, 1562 (*Beck*).) The intent of the parties to a written agreement alleged to be ambiguous "is to be

[3] Further statutory references are to the Civil Code.

inferred, if possible, solely from the written provisions of the contract. ([Citation.], § 1639.) The 'clear and explicit' meaning of these provisions interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to then by usage' ([citation], § 1644) controls judicial interpretation. ([Citation.], § 1638.)' [Citations.] This reliance on common understanding of language is bedrock." (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.)

The heart of the dispute between the parties is the significance in the letter of intent of the following language: "Landlord and Tenant agree to negotiate in good faith. Either Landlord and [*sic*] Tenant may, for any reason and without cause, terminate negotiations and this Letter of Intent at any time." Denier urges us to conclude that the provision that the parties negotiate in good faith binds the parties. Sotheby's International argues that the termination clause manifests the intent of the parties to allow either party to walk away from the negotiations at any time. In the context of the full letter of intent, we agree with Sotheby's International that the termination clause overrides any obligation of the parties to negotiate.

Denier acknowledges that the letter of intent included mutual termination provisions. However, he argues that Sotheby's International's nearly immediate termination of the agreement and failure to negotiate the terms of a new lease in good faith was a breach of the parties' agreement to negotiate. In support of his contention, Denier argues that the letter in this case is similar to the agreement in *Copeland v. Baskin Robbins USA* (2002) 96 Cal.App.4th 1261 (*Copeland*), wherein the court found that the parties entered into a binding agreement to negotiate. *Copeland* involved a prospective sale of an ice cream manufacturing plant. (*Id*. at pp. 1253-1254.) During negotiations, prospective buyer Copeland communicated to prospective seller Baskin Robbins that he would not complete the purchase of the plant unless Baskin Robbins agreed to a "co-packing agreement" to buy ice cream produced by Copeland at the plant for a period of

three years after the sale. (*Ibid.*) The parties signed a letter agreement stating that Baskin Robbins would sell its ice cream plant to Copeland for $1.3 million, and Baskin Robbins "would agree, subject to a separate co-packing agreement and negotiated pricing," to provide Copeland a three-year co-packing agreement for 3 million gallons in year one, then 2 million gallons in years two and three. (*Id.* at p. 1254.) After months of negotiating the potential terms of the co-packing agreement, Baskin Robbins pulled out of negotiations and did not finalize an agreement. (*Ibid.*)

Copeland sued Baskin Robbins for breach of the letter agreement that the parties had signed, alleging that Baskin Robbins had wrongly refused to negotiate the co-packing agreement that the parties had contemplated under the letter agreement. (*Copeland, supra*, 96 Cal.App.4th at pp. 1254-1255.) The Court of Appeal affirmed the trial court's judgment in favor of Baskin Robbins, explaining that if parties enter into an agreement to negotiate and "despite their good faith efforts, [they] fail to reach ultimate agreement on the terms in issue the contract to negotiate is deemed performed and the parties are discharged from their obligations. Failure to agree is not, itself, a breach of the contract to negotiate. A party will be liable only if a failure to reach ultimate agreement resulted from a breach of that party's obligation to negotiate or to negotiate in good faith." (*Id.* at p. 1257, fns. omitted.)

The court in *Copeland* contrasted an agreement to negotiate, which it found to be enforceable, with an "agreement to agree," which the court in *Beck, supra*, found not enforceable. In *Beck*, the plaintiff sued American Health International for breach of contract based on its letter to him regarding an employment contract. The letter stated: " 'It is a pleasure to draft the outline of our future agreement . . .' " (*Beck, supra*, 211 Cal.App.3d at p. 1562, italics omitted.) After outlining the terms of the agreement, the letter concluded: " 'If this is a general understanding of the agreement, I ask that you sign a copy of this letter, so that I might forward it to Corporate Counsel *for the drafting of a contract*.' " (*Id.* at p. 1559, fn. 1.) " 'When we have a draft, we will discuss it and

hopefully shall have a completed contract and operating unit in the very near future.' " (*Ibid.*, italics in original.)

The court in *Beck* held that the letter "did not constitute a binding contract, but was merely 'an agreement to agree,' which cannot be made the basis of a cause of action." (*Beck, supra,* 211 Cal.App.3d at p. 1563.) The court noted that " 'preliminary negotiations or an agreement for future negotiations *are not the functional equivalent of a valid, subsisting agreement.*' " (*Id.* at p. 1562, italics added.) The court based its conclusion on the words of the letter which "manifest an intention of the parties that no binding contract would come into being until the terms of the letter were embodied in a formal contract to be drafted by corporate counsel." (*Id.* at p. 1563.)

The letter of intent in the present case is more akin to the agreement to negotiate in *Copeland*, rather than an "agreement to agree" as discussed in *Beck*. Like the parties in *Copeland*, Denier and Sotheby's International agreed to negotiate the terms of a further agreement, here, a new lease, in good faith. Specifically, the letter stated that it constituted an "agreement of Landlord and Tenant to conduct further negotiations concerning a written lease agreement between Landlord and Tenant," and that "Landlord and Tenant agree to negotiate in good faith." However, the agreement to negotiate in good faith in the letter of intent is distinguishable from the agreement in *Copeland* in one very important respect. Here, the letter of intent was subject to the mutual *termination provisions allowing either party to terminate the agreement at any time for any reason*. The agreement to negotiate in good faith in *Copeland* was *not* subject to a termination provision. The mutual termination provision in the letter before us clearly afforded each party a right that permitted Sotheby's International to do exactly what it did—terminate the agreement at any time, even immediately after entering into the agreement. This provision, clear on its terms, cannot be ignored when construing the meaning of the document as a whole.

Denier, however, further contends that the inclusion of essential lease terms, as well as the long-term rental history of the parties, and the fact that Denier and Sotheby's International had executed four lease extensions over that period, demonstrate that the letter of intent constituted a binding agreement between the parties to negotiate. A letter of intent to enter into a lease can constitute a binding contract on both landlord and tenant, depending on the expectations of the parties. (*Mann v. Mueller* (1956) 140 Cal.App.2d 481, 487.) "Where the parties . . . have agreed in writing upon the essential terms of their contract, even though several more formal instruments are to be prepared and signed later, the written agreement which they have already signed is a binding contract. When one party refuses to execute the more formal instruments intended, the other has a right to rely upon the agreement already expressed in writing. [Citation.]" (*Ibid.*) The intent of the parties may be inferred from their conduct and surrounding circumstances. (See *City of Santa Cruz v. MacGregor* (1960) 178 Cal.App.2d 45, 53-54 (*MacGregor*).)

The fact that a letter of intent contains all the essential terms of a lease is similarly relevant to the determination of whether the agreement is binding. (*California Food Service Corp. v. Great American Ins. Co.* (1982) 130 Cal.App.3d 892, 897.) "To create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed term; and third, a definite and agreed price of rental, and the time and manner of payment." (*Levin v. Saroff* (1921) 54 Cal.App. 285, 289 (*Levin*).) However, ". . . while these elements are necessary to the existence of a lease, they are not sufficient alone to create a lease unless the parties so intend. [Citations.] The question is to be determined by a construction of the instrument in light of the surrounding circumstances. [Citations.])" (*MacGregor, supra,* 178 Cal.App.2d at pp. 53-54.)

Applying these principles, the court in *MacGregor* found a signed document to "enter into a lease" for a building yet to be constructed to be a binding lease agreement

where the owner of a commercial property persuaded the owner of a tire business to move at a future date from his established location into the proposed building. The document described the amount of rent to be paid, the location of the property, and a lease term of five years from the date of completion of construction. When the building was finally constructed, the business owner moved in, paid rent according to the terms of the agreement to "enter into a lease," spent money improving the premises and had been in possession for 29 months at the time litigation commenced. No other documents were formalized. Under these circumstances, the court held that the parties had entered into a valid lease agreement. The court stated: "The conduct of the parties was such that, whatever may have been the situation before the building was built and [the tenants] took possession, a court could properly find that the written agreement became a binding lease by tacit agreement of the parties when [the tenants] moved in." (*MacGregor*, *supra*, 178 Cal.App.2d at p. 53.)

We agree with Denier that the essential terms of a lease as outlined in *Levin, supra,* were included in the letter of intent. Specifically, the letter identified the landlord and the tenant as Denier and Sotheby's International respectively. The property to be leased was 200 Clock Tower Place, Building D, Carmel, CA 93923. The new lease was to begin on August 1, 2017 for a term of eighty-four months. The rent for the property was $2 per square foot per month for 6,600 square feet of space. The letter also contained options for Sotheby's International to make improvements, expand, and sublease the space.

However, while we agree that the letter included specific terms of a proposed lease, we do not conclude with Denier that the inclusion of these terms evinced an intent of the parties to bind themselves to any such terms. The plain language of the letter of intent stated the opposite. The parties agreed that the letter of intent was solely an agreement to *further* negotiate a lease. It contained very clear disclaimers that the letter of intent "is not intended, nor shall it be deemed or interpreted to be a lease agreement

between Landlord and Tenant." "This proposal is an outline of the major lease provisions only and is neither a binding legal agreement nor should it be construed as a legal proposal to lease." Additionally, the letter of intent imposed conditions to be met, stating that there would be no liability or obligation imposed on either party unless Denier approved Sotheby's International's financial statements and a "[l]ease is mutually executed by Tenant and Landlord and delivered to Tenant." Neither of these conditions occurred in this case. Nor do we agree that the parties' multiple year history as landlord and tenant, and negotiation of four previous lease extensions, override the clear language of the disclaimers stating that the letter of intent did not constitute a binding agreement, or the termination clause which allowed either the landlord or tenant to, ". . . for any reason and without cause, terminate negotiations and this Letter of Intent at any time."

Denier asserts that when the parties stated that "Landlord and Tenant agree to negotiate in good faith," that language imposed upon them an obligation to commence negotiations after signing the letter of intent, even if either party was free to subsequently walk away from any proposed agreement. However, we agree with Sotheby's International that the document itself clearly indicates that the parties had already commenced negotiations, stating, ". . . this letter constitutes the agreement of Landlord and Tenant to conduct *further negotiations* concerning a written lease agreement . . ." Denier himself conceded at oral argument that negotiations were ongoing at the time the parties signed the letter of intent. This language further persuades us that the termination clause could be invoked by either party consistent with the obligation to negotiate in good faith.

In short, looking at the whole of the letter of intent, and giving effect to every part, we hold that the mutual termination provision is clear and unambiguous. (§ 1641.) The terms of the letter of intent demonstrate that each party had the right to terminate negotiations, and the letter of intent itself, at any time. Therefore, Sotheby's

International's termination of the agreement did not constitute a breach of contract, and the complaint failed to state a cause of action for breach.

C. Fraud

A party to a contract commits fraud by making a promise without any intention of performing it. (§ 1572.) Within the tort context, the elements of fraud are: " '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.]" (*Id.* at p. 638.)

Denier contends that Sotheby's International fraudulently misrepresented that it would negotiate a new lease in good faith, and had no intention of doing so; rather, Sotheby's International used Denier's acceptance of the proposal in the letter of intent as leverage to negotiate a lease for another premises. Denier asserts he suffered damages because he refrained from seeking another tenant based on Sotheby's International's misrepresentation.

In alleging that Sotheby's International committed fraud by making a false promise, Denier again overlooks the mutual termination provision included in the letter of intent. As we have concluded above, this provision clearly stated that both parties had the option to terminate the agreement at any time and for any reason. There are no facts alleged showing that Sotheby's International misrepresented any information in the letter of intent. Moreover, Denier's allegation that he was damaged because he did not look for new tenants in reliance on Sotheby's International's fraudulent promise to negotiate a new lease is without merit. Denier was on notice from the mutual termination provisions that the agreement could be terminated at any time. The complaint therefore fails to state a cause of action for fraud.

D. Leave to Amend

The court sustained Sotheby's International's demurrer to the complaint without leave to amend. Based on the clear language of the letter of intent, Denier cannot meet his burden of proving that there is a reasonable possibility that the defects in the complaint can be cured by amendment. (See *Blank*, *supra*, 39 Cal.3d at p. 318.) We are persuaded that no construction of the plain meaning of the language of the letter of intent would result in a legitimate opportunity for Denier to amend his complaint to state a cause of action. We find that the trial court did not abuse its discretion in sustaining the demurrer to the complaint without leave to amend.

III. DISPOSITION

The judgment is affirmed.

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Greenwood, P.J.

WE CONCUR:

_____
Elia, J.

_____
Danner, J.

Denier v. Sotheby's International Realty, Inc. et al.
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